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मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

CRIMINAL APPEAL No. 438/2003

Appellants (1) Munna @ Ishwari s/o Balaram Yadu, aged about 28 years, R/o Mahavir Colony, Durg, Distt. Durg (C.G).

(2) Rajesh Yadav, s/o Kamlooram, aged about 22 years, r/o Shanker Nagar, Durg, Distt. Durg (C.G).

(3) Tarachand s/o Sarjuram, aged about 36 years, r/o Pacharipara, Durg, Distt. Durg (C.G)

Vs.

Respondent State of Chhattisgarh, through the Police Station, Pulgaon Distt. Durg (C.G)

Criminal Appeal under Section 374 (2) of the Code of Criminal Procedure

D.B: Hon'ble Shri L. C. Bhadoo, &
Hon'ble Shri Sunil Kumar Sinha, JJ.

Appearance:

Shri Yashwant Tiwari with Shri Amiya Kant Tiwari, counsel for the Appellants

Shri U.K.S. Chandel, Panel Lawyer, for the state

ORAL JUDGMENT

(15.11.2007)

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आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

The following judgment was delivered by

L.C.Bhadoo, J,

(1) The accused appellants have preferred this appeal u/s 374(2) of the Code of Criminal Procedure questioning the legality and correctness of the judgment of conviction and order of sentence dated 10th March 2003 passed by VII Addl. Sessions Judge (F.T.C.), Durg, in Sessions Trial No.204/2001 whereby and whereunder the learned Addl. Sessions while holding the accused appellants guilty for commission of the offence punishable u/s 302 read with section 34 I.P.C. for committing the murder of Sanjay Sahu @ Banti, sentenced each of the accused to undergo imprisonment for life and to pay a fine of Rs.1000/-, in default of payment of fine to further undergo 6 months S.I. However, the learned Addl. Sessions Judge acquitted six other accused persons namely Samaru, Dharmendra, Sambhu Kumar Soni, Rajesh Dobi, Tilak & Kartik.

(2) The case of the prosecution in brief is that P.W. 13 Sanjay Kumar was working as helper on Bus No. MKL 21-9856 of G.R. Travels. On the fateful day i.e., 06.07.2000 Manoj Sahu, driver of the Mini Bus alongwith Babloo Chourey, conductor, took the passengers in the Mini Bus to Khairagarh. At about 4.25 p.m., they were returning to Durg with passengers. When the bus reached to village Lithiya , the

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	Checker Banti alias Sanjay and Ashfaq, brother of bus owner checked the bus and they also boarded the bus for coming to Durg. When at about 5.30 p.m., the bus reached to the toll tax barrier of village Hasda, the Bus stopped there. Banti @ Sanjay Sahu along Babloo the conductor alighted from the bus in order to pay the toll tax where Babloo offered Rs.20/- as toll tax whereas the toll tax person asked him to pay Rs.30/- on which Banti (since deceased) said that the rate is of Rs.20/-, why he is asking for more money and even there was no season at that time. On which, the contractor Munna Yadav, who was sitting at the barrier, said that we are taking Rs.30/-, that he has to pay, he caught hold from the collar of shirt *Banti*, after pushing him started abusing in the name of mother. Banti said as to why he is abusing, on which Munna took out a country made pistol and put it on the chest of Banti and said that he is continuously indulging in *Dadagiri*. He will teach him lesson, saying so he asked his associates "attack him". On which Rajesh Yadav of Durg attacked Banti on his head with a Farsa (battle axe), as a result of which, Banti fell down on the other corner of the road. Then Munna took the Farsa from Rajesh and he attacked on the head of Banti. Tarachand Nirmalkar attacked with club on head, hand and other parts of the body. 6-7 other associates of Munna also attacked the deceased with the club. There was profuse bleeding from the head and other parts of the body of deceased. All the accused persons fled from the scene of	

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occurrence by a Jeep. The complainant Sanjay Kumar saw Banti who was already dead. The complainant along-with driver went to Police Station Pulgaon, lodged the first information report under Ex.P.38. He gave *merg* intimation Ex.P.39. The I.O. left for the scene of occurrence and prepared the site plan (Ex.P.2) of the place of occurrence. After giving notice Ex.P.20 to the *Panchas*, he prepared an inquest Ex.P.21 on the body of deceased. The body was sent for postmortem examination to Govt. Hospital, Durg, where Dr Lal Mohmmad (P.W.6) conducted the postmortem. He opined that the cause of death was shock as a result of the head injury. According to him, all the injuries were antemortem in nature. He prepared postmortem report Ex.P.15 & P-16. During investigation, the accused Munna gave memorandum Ex.P.3, in pursuance of that, he got recovered a country made pistol under Ex.P.17. His clothes were seized under P.7 whereas accused Rajesh Yadav gave memorandum Ex.P.5 in pursuance of that, he got recovered the Farsa (battle axe) under Ex.P.48. His clothes were seized under Ex.P.9. The accused Tarachand gave memorandum Ex.P.6 and in pursuance of that a sword was seized under Ex.P.49. The seized weapons were sent for examination by the Doctor who after examining the weapons, gave an opinion Ex.P.18. The articles were sent for chemical examination to the Forensic Science Laboratory, Raipur, from where a report Ex.P.38 was received. After completion of the investigation, the charge sheet was filed in the Court of

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	J.M.F.C., Durg, who in turn committed the case to Sessions Judge, Durg, from where the learned Addl. Sessions Judge, Durg, received the case on transfer for trial. **(3)** The prosecution, in order to establish the charges against the accused persons, has examined 18 witnesses. The statement of the accused persons were recorded u/s 313 Cr.P.C., in which they denied the material appearing against them and stated that they have been falsely implicated in the crime in question. **(4)** Learned Addl. Sessions Judge after hearing counsel for the respective parties convicted and sentenced the accused appellants as aforementioned. **(5)** We have heard Shri Yashwant Tiwari with Shri Amiyakant Tiwari, learned counsel for the appellants and Shri U.K.S. Chandel, Panel Lawyer, for the State. **(6)** At the out set, Shri Tiwari has not disputed the homicidal death of Banti @ Sanjay. Moreover, P.W.8 Ashfaq, P.W.11 Manoj Kumar & P.W.13 Sanjay Kumar, scribe of the F.I.R. (Ex.P.38), who witnessed the crime in question has categorically stated that the accused persons attacked with *Farsa* and inflicted injuries on the head and this ocular evidence is corroborated by medical evidence of Dr.Lal Mohmmad (P.W.6) who conducted the postmortem. He has stated that as many as 16 injuries on various parts of the body and fatal injuries on the head of the deceased were inflicted, even the skull bone was fractured, brain matter was coming	

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out and said that all the injuries were ante-mortem in nature. He has further stated that the cause of death was head injury. In view of the above ocular and medical evidence, it is established that the death of Banti @ Sanjay was homicidal in nature.

(7) As far as the complicity of the accused appellants in crime in question is concerned, their conviction primarily rests on the ocular evidence of P.W.8 Ashfaq, P.W.11 Manoj Kumar & P.W.13 Sanjay Kumar, who have stated that when the bus was returning to Durg and reached near Hasda toll tax barrier, Banti @ Sanjay (since deceased) and Babloo alighted from the bus and went to the barrier of toll tax for payment of tax, Babloo offered Rs.20/- on which the accused Munna asked him to pay Rs.30/-. Banti replied that the rate is of Rs.20/-, why he is asking for Rs.30/-. Munna said that they are taking only Rs.30/- which he has to pay. Thereafter Munna took out a country made pistol and he put it on the chest of the Banti, and asked his associates to attack him. Rajesh immediately came with Farsa (battle axe), he attacked on the head of Banti @ Sanjay, as a result of which, he fell down on the other corner of the road. Munna took that battle axe from Rajesh, he also attacked on the head. It is stated that thereafter Tarachand also attacked with *Danda* and other persons also attacked with *Dandas*, as a result of which Banti died on the spot. The matter was reported by Sanjay Kumar (P.W.13). The evidence of these 3 witnesses is consistent as far as

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accused Rajesh & Munna are concerned and the defence has not been able to bring any material on record in the cross examination which may discredit the evidence of these witnesses.

(8) Shri Yashwant Tiwari argued that the weapons were not shown to the Doctor during the evidence in the Court, therefore, it cannot be said that the injury was inflicted to the deceased with the same battle axe, which was seized. In this connection, if we peruse the evidence of Dr.Lal Mohmmad (P.W.6) in para 4 of his evidence, he has categorically stated that on 22nd July, 2000 the seized articles i.e., weapons were sent to him for examination alongwith a requisition for giving opinion as to whether the injuries found on the body of Banti @ Sanjay could be caused by those weapons. After inspection of the weapons and the postmortem report, he gave opinion that it was possible to cause injuries by those weapons which were found on the body of the deceased. He has proved his report as Ex.P.18. In view of this evidence, merely not showing the weapon in the Court to the Doctor, the evidence of the doctor and the documents tendered into evidence regarding his opinion cannot be ignored.

(9) Learned counsel for the appellants further argued that in this case, Babloo was also present at the time of occurrence, in fact, he offered the toll tax but he has not been examined. Therefore, merely on the evidence of these 3 witnesses the crime is not established against the appellants. In the present

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	case as has been mentioned earlier, 3 eye witnesses have already been examined and their evidence is consistent in respect of the attack made by the accused Munna & Rajesh. Merely non-examination of Babloo, evidence of these 3 witnesses cannot be rejected. **(10)** It is settled law that the quality of the evidence has to be considered regarding involvement of accused in crime and not the quantity. Therefore, looking to the evidence of these 3 witnesses, even if Babloo has not been examined, the evidence of these 3 witnesses cannot be brushed aside merely on the ground of non-examination of Babloo. **(11)** Shri Tiwari also submitted that there was no previous animosity between the appellants Munna & Rajesh and the deceased, the quarrel started at the spur of moment without preparation and premeditation, the attack was made without intention to cause death. He further argued that in this case, six other accused persons have already been acquitted and the evidence of these 3 eye witnesses is to the extent that in the first instance accused Rajesh attacked with Farsa, thereafter Munna took that Farsa from Rajesh and he also attacked with the same Farsa on the head of Banti and Tarachand attacked with a club whereas as many as 16 lacerated, incised and cut injuries were found on various parts of the body of deceased and only 2 head injuries had been attributed to Munna and Rajesh. The death of Banti was the cumulative effect of all the injuries, in these circumstances only the knowledge can be	

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attributed to the accused Munna & Rajesh not the intention, as such, the offence against the accused Rajesh & Munna does not travel beyond section 304 Part-II of I.P.C. He placed reliance on judgments of the Apex Court in the matter of ***Suresh Sitaram Surve –vs- State of Maharashtra, 2002 AIR SCW 4834 & Bhima @ Bhimarao Sida Kamble and others –vs- State of Maharashtra, 2002 AIR SCW 3553.***

(12) On the other hand, Shri U.K.S. Chandel, Panel Lawyer appearing for the State supported the judgment of the trial Court.

(13) In order to appreciate the arguments advanced by Shri Yashwant Tiwari, we have again scrutinized the evidence of 3 eye-witnesses namely P.W.8 Ashfaq, P.W.11 Manoj Kumar & P.W.13 Sanjay Kumar as also the evidence of P.W.6 Dr.Lal Mohammad who conducted the postmortem.

(14) P.W.6 Dr.Lal Mohmmad in para 4 of his cross examination stated that there were 3 incised wounds, it is impossible for him to answer as to whether all the incised wounds were caused by one weapon or more than one weapon. Looking to the number of injuries, it can be said that equal number of attacks must have been made. In answer to the question put by learned counsel for the defence that the death was as a result of cumulative effect of the injuries, the Doctor replied "No". An injury was on the brain and on account of that, the brain matter came out and that was the cause of death. Therefore the doctor has specifically stated that the

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death was due to brain injury. The 3 eye witnesses have categorically stated that after abusing in the name of the mother, accused Munna asked his associate to attack Banti @ Sanjay, in pursuance of that accused Rajesh attacked with Farsa (battle axe) on the head, as a result of which, Banti fell down then Munna took that Farsa, he also attacked on the head. Tarachand attacked with club and other accused persons also attacked the deceased. Therefore, there is clear cut evidence regarding head injuries which are attributed to Rajesh & Munna that each of these accused Rajesh & Munna inflicted one blow on the head of the deceased with Farsa. Accused Tarachand also attacked with the club. For other injuries, particularly about 14 other incised cut injuries, there is no clear cut evidence that who inflicted those injuries. In order to ascertain the intention of the accused as to what intention the accused was carrying in his mind, for that no direct evidence can be adduced. The intention of the accused can be inferred from the back ground in which the attack was made, the conduct of the accused during the crime was committed, the nature of the weapon with which the attack was made, the force with which the attack was made, the part of the body chosen by them for the attack, these factors can be considered as has been said by the Apex Court in the matter of ***Thangaiya –vs- State of Tamil Nadu, 2005 Cri.L.J. 684.***

(15) In light of the above principle based on ocular and medical evidence, only inference can be drawn that the head

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injury which was responsible for the death was caused by Rajesh & Munna with a Farsa. The oral evidence has to be appreciated taking into consideration the medical evidence and those injuries were responsible for the cause of death. The nature of the weapon used by accused Rajesh & Munna in attacking the deceased on the head i.e., vital part of the body and the force with which the injury was inflicted i.e., the bone was fractured and even the brain matter came out that also sustained the injury and those injuries were inflicted by Munna & Rajesh, therefore, as far as accused Munna & Rajesh is concerned, in view of the evidence and the nature of weapons used by them and the part of the body chosen by them where the attack was made that too after saying "attack him", makes it clear that these two accused persons attacked the deceased with an intention to cause death.

(16) As far as the judgments relied upon by learned counsel for the appellants are concerned, these judgments are distinguishable on facts. In case of *Suresh Sitaram Surve –vs- State of Maharashtra* (supra), the injury attributed to the appellant was by *Gupti* on abdomen whereas 4 other injuries were found on the chest, which were responsible for the death of the deceased and in those circumstances, the Court reached to the conclusion that it cannot be inferred that the appellant caused all the severe injuries or the fatal injuries, therefore he cannot be said to have intended to cause death and

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	accordingly the sentence was modified to section 304 Part-I from section 302 of I.P.C. **(17)** In the matter of *Bhima @ Bhimarao Sida Kamble (supra)* also, a large number of persons armed with sticks or pelted stones and it was not established as to who specifically attacked whom. The court held that the common object was to commit offences under sections 323, 325 read with S.147/149 and not under section 302 read with Section 149. In the present case, the accused appellant chose the vital part of the body and that too with deadly weapon, therefore, the above case is of no help to the accused appellants. Therefore, the accused Munna & Rajesh Yadav have rightly been convicted u/s 302 read with section 34 I.P.C. and we have no reason to interfere with the finding of the trial Court and to that extent we do not find any infirmity or illegality in the judgment of the trial Court. **(18)** As far as the accused Tarachand Nirmalkar is concerned, eye witnesses P.W.13 Sanjay Kumar lodged the F.I.R. Ex.P.38 in which he specifically stated that this accused attacked the deceased with club whereas in the court evidence this eye witness has stated that he attacked with the sword. In view of this, there is an improvement in the court evidence of this eye witness. More over, the deadly injuries were inflicted by Munna & Raju, therefore, it makes doubtful about the attack made by him and he is entitled to the benefit of	

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	doubt. Hence the conviction and sentence imposed upon him u/s 302 read with section 34 cannot be sustained. **(19)** In the result, the appeal filed by Tarachand Nirmalkar succeeds and he is acquitted of the charges u/s 302 read with section 34 I.P.C. Consequently, the sentence imposed against him is also set aside. He be set at liberty forthwith, if not required, in any other case. **(20)** The appeal of Munna & Rajesh Yadav fails. The same is liable to be dismissed and it is hereby dismissed. **Sd/-** **L.C. Bhadoo** **Judge**	**Sd/-** **Sunil Kumar Sinha** **Judge**
Rao		

शासकीय क्षेत्रीय मुद्रणालय, राजनांदगांव —FS/59— 8/2007 —30,000.